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Uniformity: Uniformity of the Commercial Code

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UNIFORM COMMERCIAL CODE COMMENTARY

UNIFORMITY

UNIFORMITY OF THE COMMERCIAL CODE

By the end of 1968, the Uniform Commercial Code will have come into effect in 51 of the 54 jurisdictions in American law,¹ including all the important commercial states.² This widespread enactment raises the question whether lasting uniformity has been achieved for commercial law in this country. An answer to this question requires a consideration of three included questions. The first involves the treatment given the Code by the legislatures. In the process of being enacted, the text of the Code has undergone a significant amount of variation. What are the implications of these variations? Secondly, there is a question of prognostication. When the courts of the several jurisdictions are called upon to interpret and apply the Code, how far are they likely to further diversify its content? There is, finally, a theoretical question which includes elements of the first two questions. To what extent will the Code be able to develop, expand, and meet changing needs without losing the advantages of uniformity? It is the purpose of this comment to explore these questions.

I. WHY UNIFORMITY?

At the outset it is important to gain an understanding of what uniformity of commercial law means. It is also important to weigh the value of uniformity in commercial law and to determine the limitations which, with propriety, may be placed on it.

For the purposes of this comment, commercial law is given a common sense meaning which raises no difficulties to understanding. The meaning of uniformity requires some elaboration. In an abstract sense it may be defined as sameness, the absence of differences or distinguishing features, a degree of similarity approaching identity. Thus, it can be seen that uniformity is a relative term; some sets of objects may exhibit more uniformity than other sets of objects. In theory, the identity which uniformity of commercial law approaches is a state in which the outcomes, or legal consequences, of like transactions are unaffected by the fact that the transactions occur in one rather than another jurisdiction. As a practical matter, uniformity would be achieved as long as differences of outcome are not importantly different.

As a result of two distinct limitations on its scope, the Code cannot be expected to achieve that degree of uniformity. First, the Code is limited to

¹ The jurisdictions include the fifty states, the District of Columbia, Puerto Rico, the Virgin Islands, and the Canal Zone.

² Of the fifty states, only Louisiana has not yet enacted the Code.

commercial law. Although commercial law is vitally important and pervades social life to such an extent that the Code, if uniform, must exert a unifying influence on all of the law, the Code is not overtly designed to achieve uniformity in all areas of the law. Second, even within the sphere of commercial law, the Code is not all-inclusive. It only partially regulates such important secondary areas as the laws of procedure, evidence, and capacity,³ all of which play important roles in determining the outcome or legal consequences of any transaction. Those who favor a maximum of uniformity for commercial law may well feel that this limitation is a defect in the Code as drafted, albeit a limitation made unavoidable by political considerations. Be that as it may, the Code is not designed to achieve uniformity even of commercial law.⁴ As drafted, it seeks uniformity within even more narrow limits. In order to appreciate those limits and to see how far they may vary without defeating the basic purposes of the Code,⁵ it is necessary to understand the value of uniformity and the arguments which support it.

Several arguments have been advanced in favor of uniformity of law and, in particular, in favor of uniformity of commercial law. First, uniformity is seen as a logical necessity, given the inherent nature of commercial activities. "Commercial law . . . deals with matters of world-wide moment. It subserves universal needs. In consequence, to achieve its end, it must be more or less universal."⁶ Underlying this logical argument, there is a strictly economic argument which looks to the detrimental effects of non-uniformity, the imposition of a "tax" on the affairs of businessmen.⁷ If the law from place to place differs, those who do business in more than one place must at some cost discover what the differences are and govern themselves accordingly. In the extreme, such differences may inhibit a transaction or alter its nature. Uniformity, on the other hand, permits the law to be readily known and predicted. This is both convenient and more efficient for businessmen. It enables them to expand their businesses and make more complex their transactions. The net long-run result is increased commercial prosperity.

Although this argument was quite strong in 1892, when the uniform law movement began,⁸ two factors have somewhat weakened its practical effect

³ See U.C.C. § 1-103. All citations to the Code are to the 1962 Official Text, as amended by Permanent Editorial Board for the Uniform Commercial Code, 1966 Official Recommendations for Amendment of the Uniform Commercial Code [hereinafter cited as 1966 Amendments].

⁴ It may be contended that absolute uniformity is never possible to obtain even if all the laws are identical. Factors outside the scope of the law, e.g., crowded dockets which increase the pressures to settle litigation in some jurisdictions, lead to different outcomes solely because of the location in which a transaction occurs. In this comment, attention is directed primarily to the outcome-determinative effects of the law itself.

⁵ These basic purposes are set out in U.C.C. § 1-102(2).

⁶ Pound, *Uniformity of Commercial Law on the American Continent*, 8 Mich. L. Rev. 91, 93 (1909).

⁷ This position has most recently been iterated in Schnader, *Why the Commercial Code Should Be "Uniform,"* 20 Wash. & Lee L. Rev. 237 (1963), reprinted at 69 Com. L.J. 117 (1964).

⁸ As long as commercial intercourse between the states was at a low level, it was not a matter of much concern that the individual states might choose to govern different aspects of commercial affairs by their individual laws. But, as the kinds of interstate

today—despite the enormous increase in multi-state commercial transactions. First, there is the fact that most of the states have now enacted a commercial code. When the basic commercial law of a state is contained in a single annotated statute, the task of researching is considerably easier and correspondingly less expensive than it would be if all this research required a case study for each point in question. The codification of commercial law also eliminates the needless speculation which would be caused by the fact that in many jurisdictions the case law would have gaps filled only by nonbinding precedents from other jurisdictions. Second, there is the fact that fifty-one jurisdictions now have some version of the Uniform Commercial Code. This simplifies the problems even further, since the attorney who does the research will, presumably, be familiar with the basic structure of the Code and will have little difficulty in finding the points he is looking for. In addition, when he becomes involved with a question as to the law in other jurisdictions, he need only avail himself of the many services available⁹ to determine if there is a textual or court-constructed variation in effect. These considerations do not, of course, negate the argument that uniformity fosters commercial prosperity. Not every businessman consults an attorney for every transaction. There is considerable value in not disappointing expectations which are the result of a long working experience with the commercial law of one state. Furthermore, there is always the possibility that even a well-known substantive variation in a given state will make commercial transactions involving that state more complicated, and therefore more expensive.

Another line of argument favoring uniformity looks to the contents of the rules which are to be applied. Theoretically, some rules must be better than others, and it should be possible, for each commercial situation, to discover the optimum rule of law. Once such a rule has been discovered, it makes sense for that rule to be universally applied.

The attainment of uniformity is opposed by two different kinds of argu-

activity increased, and as the complexity and importance of transactions involving more than one state grew, differences in the laws imposed increasingly unacceptable burdens on business. In addition to creating uncertainty, the laws in some states were in fact inimical to the interests of businessmen from other states. To a certain extent the doctrine of *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842), not to be overruled until 1938, meliorated these conditions. If the outsider qualified for the federal courts, the federal common law relating to commerce might be more favorable to him than the state common law. Under this doctrine, the federal courts exerted unifying pressures, and the genesis of the Code cannot be appreciated without considering the demise of this doctrine.

By 1890 it became clear that additional steps needed to be taken. The National Conference of Commissioners on Uniform State Laws was organized in 1892 to implement solutions through the promulgation of laws to be enacted by all the states; the Negotiable Instruments Law (NIL) in 1896 was the first such uniform law promulgated. In the area of commercial transactions, the NIL was followed by the Uniform Sales Act and the Uniform Warehouse Receipts Act in 1906; in 1909 came the Uniform Stock Transfer Act and the Uniform Bills of Lading Act; still later, the Uniform Trust Receipts Act and the Uniform Conditional Sales Act were offered. Of these acts, only three were enacted in all states, although all received widespread adoption.

⁹ E.g., Uniform Commercial Code (U.L.A. 1962) (supplemented by annual pocket parts); Willier & Hart, Uniform Commercial Code Reporter-Digest (1966) (looseleaf). The periodic Reports of the Permanent Editorial Board for the Uniform Commercial Code are also a source of this information.

ments. One perceives in the quest for uniform state laws the loss of a portion of state sovereignty. The other challenges the specific benefits which uniform laws are supposed to obtain.

The first kind of argument has a great deal of merit. Loss of sovereignty is found in a narrowing of the bounds wherein a state may choose to depart from nationwide norms. It is felt that too much uniformity impedes the orderly development of the law by inhibiting the testing through practice of new ideas and new rules. Although it is valuable to have new ideas tested through practice, and although diversity of law from jurisdiction to jurisdiction is one way of achieving this kind of testing, all development does not require testing at a practical level. It is possible to develop law through theoretical experimentation—as the volumes of writings exploring the Code will attest.¹⁰ In addition, the Code is not inimical to the development of the law; section 1-102(2)(b) expressly reveals the interest of the draftsmen in allowing new ideas to be developed by the practices of businessmen.¹¹ At heart, this argument against too much uniformity is the complement to the second argument favoring uniformity, since both look to the development or discovery of more nearly perfect rules of law.

Secondly, without denying the validity of the arguments favoring overall uniformity, a slightly different rule may be preferred in some localities because of a supposed advantage to local interests. This type of opposition, in the long run, must be self-defeating. If every locality were to adopt those rules which appeared most to favor local interests, the commercial law would soon lose that certainty and predictability which permits continued prosperity.

Opposition to a uniform rule may also arise from inertia. This argument is somewhat as follows. Since the existing rule has served more or less satisfactorily for a considerable time, and since the benefits to be obtained from a uniform rule are marginal benefits, it is unnecessary, bothersome, and expensive to make the change. It is believed that the cost to the local community of changing the law will not be offset by the benefits to be gained from the uniform law. This belief is based on a fallacy, for the costs of changing over are fixed costs which once expended are never renewed, whereas the costs of nonuniformity, no matter how marginal they may be, are continuing costs which in time must overtake the costs from changing over.

The last and most potent arguments opposing uniformity are again not directed against the over-all merits of uniformity, but are founded in a fundamental disagreement about a particular proposed uniform rule. The state may find that the particular rule does not relate importantly enough to commerce and that a change in the existing rule would have a detrimental effect on an area of local concern not subject to benefit from the uniform law. Or the state may find that the proposed uniform law is not the best law available for the situations it is designed to cover. In both cases, as long as the state

¹⁰ An extensive bibliography of materials dealing with each Code section is to be found in Willier & Hart, *op. cit.* supra note 9.

¹¹ This section declares a policy "to permit the continued expansion of commercial practices through custom, usage and agreement of the parties."

has primary responsibility for commercial law, and remains the expositive unit for the uniform laws, some divergence is unavoidable. It is, therefore, important to consider why the states are the units through which unification of commercial law is being sought.

Under our constitutional system, uniformity can be attempted by one of three methods. The federal government can enact a statute regulating an area, and the statute can be enforced by the federal executive with litigation in the federal courts.¹² Alternatively, each individual state can enact an identical statute, and have the statute enforced by its separate executive authority and litigated in its separate courts. Finally, it is conceivable that uniformity could be achieved by having the states enter into a compact providing for adoption of uniform laws which include uniform administration and litigation.¹³ This last alternative does not appear to be politically feasible. With none of the choices is it possible to obtain absolute uniformity.

In the case of a federal statute, the federal courts in different circuits may reach different interpretations and constructions. Although the Supreme Court can, in the long run, settle questions of construction once the difference between the circuits has crystallized, as a practical matter, such differences will always be arising, and as one difference is resolved a new one will have appeared. Nonuniformity of this kind produces the same deleterious results as nonuniformity between the states, although on a lesser scale. Uncertainty as to which court will decide any litigation that may arise, coupled with the knowledge that litigation may have to be inordinately prolonged to reach a fair result, increases the cost of commercial dealings. An example of this kind of nonuniformity is to be found in the patent system.¹⁴

Under the states, different and more difficult problems are created. The fact that fifty or more legislative wills must reach agreement before identity of text can be achieved is but the starting point. The problem of differing constructions by the courts is aggravated by the absence of a final court of appeal. In such a situation, once a difference emerges, it is likely to become fixed, unless the legislature amends the text so as to "correct" the disparate construction. This process, however, merely changes the nature of the problem, since the difficulties of getting the legislatures to agree are reencountered. Practically, a congruity of accord may be impossible to obtain. In minor respects, differences must surely arise, and the enacted texts cannot help but reflect such differences unless the scope of the law is narrowed. The broader the scope of the law, the more certain there are to be differences in the texts. Yet another problem arises in that political influences at work in each state on behalf of local interests must inevitably meet with some success. Each such success raises a barrier to uniformity. Under the federal al-

¹² This alternative is still being proposed. See Schnader, *The Uniform Commercial Code—Today and Tomorrow*, 22 *Bus. Law.* 229, 232 (1966).

¹³ It has been suggested that such a step be taken, at least to provide a method of ironing out differences of construction and interpretation. See Franklin, *On the Legal Method of the Uniform Commercial Code*, 16 *Law & Contemp. Prob.* 330, 342 (1951).

¹⁴ See Chin, *The Statutory Standard of Invention: Section 103 of the 1952 Patent Act*, 3 *Pat., T.M. & Copyright J. Research & Ed.* 317, 320-23 (1959); *Comment*, 34 *U. Mo. K.C.L. Rev.* 393, 400-01 (1966).

ternative, such forces would still be at play, but a success would have universal significance.

As an historical matter, the decision to propound uniform laws for the states to adopt may well have been dictated by the belief that without an amendment to the Constitution, Congress would lack the requisite authority to effectively legislate in the area.¹⁵ For some, an amendment of the indicated proportions would have transferred too much power to the federal government, and therefore, the decision reflected a desire to maintain an area of state sovereignty. Such a desire, when uniform legislation is being considered, is paradoxical, because absolute uniformity is inconsistent with final authority reposing in the states. To achieve that ultimate degree of uniformity, the states must surrender authority either to Congress or to some other body, such as the Commissioners for Uniform State Laws¹⁶ or the Permanent Editorial Board for the Uniform Commercial Code. If uniformity is not viewed as an end in itself to be achieved at all cost, but is viewed as a means to achieving greater commercial prosperity—a means which each state may employ as it sees fit within broad limits—then it is possible to strike a compromise between the two forces; as a matter of fact, a substantial amount of uniformity *can* be achieved without a significant loss of state sovereignty.

The point at which a balance is to be maintained between the competing urges to uniformity and to the individuality of the states can only be intuitively discovered. The considerations which affect such a balancing have been pointed out, and a range of possible balancing points does exist. Each issue must be decided anew in the context in which it arises, but, as a general rule, the presumption must be in favor of uniformity. From an economic viewpoint, uniformity leads to the optimum benefit for the nation by removing the costs which inevitably accrue to any transaction which may be affected by different laws. It is conceded that certainty and predictability can also be engendered by compiling all the differences in the laws of the several jurisdictions in a comprehensive manner in accessible locations.¹⁷ But if Dean Pound is correct, and the inherent logic of commerce is towards universal rules,¹⁸ then once a state determines to adopt the Code—perhaps only to improve its own commercial laws—it is difficult to find compelling reasons not to perfect uniformity, even for subjects of only tangential relevance to commerce, unless a fundamental disagreement as to the policy embodied in a proposed rule arises. In these latter instances, such differences ought themselves to be standardized and then compiled as above suggested.¹⁹

¹⁵ It has been asserted that an amendment to the Constitution would still be required in order to permit Congress to enact and enforce a general commercial law which would be coextensive with the present Code. See, e.g., Schnader, *supra* note 7, at 238, 69 Com. L.J. at 117. It is submitted that such is not the case. Compare *Wickard v. Filburn*, 317 U.S. 111 (1942). See generally Braucher, *Federal Enactment of the Uniform Commercial Code*, 16 Law & Contemp. Prob. 100 (1951).

¹⁶ See generally Dunham, *A History of the National Conference of Commissioners on Uniform State Laws*, 30 Law & Contemp. Prob. 233 (1965).

¹⁷ See compilations cited note 9 *supra*.

¹⁸ See Pound, *supra* note 6, at 93.

¹⁹ See 1966 Amendments 8.

The states should be free to differ somewhat in order to permit the development and perfection of the law, but this freedom should not lightly be exercised. To lay down any other general principles would impose a rigidity that is out of keeping with the basic approaches of the Code.

With the foregoing thoughts in mind, it is now appropriate to explore, in turn, the three phases through which the Code must pass in order for lasting uniformity to be obtained. These three phases are uniformity of text, uniformity of interpretation, and uniformity of development.

II. THE COMMERCIAL CODE IN THE LEGISLATURES: UNIFORMITY OF TEXT

The Code has not been adopted with identical provisions in all the states which have received it. From state to state, additions to, alterations of, and omissions from the official text have taken place.²⁰ Eleven jurisdictions have varied, in effect, every section of the Code through failure to enact section 1-109, which makes section captions part of the act.²¹ Indeed, the complete official text is not in effect in *any* state.²² In order to evaluate how far this process of varying provisions has affected uniformity of text, it is necessary to examine more closely the types of variations which have occurred.

Four categories of variations may be distinguished among the enacted versions of the Code. The first category contains unintended variations which are the result of typographical errors and faulty proofreading.²³ Some of these errors may have important substantive effects unless corrected by subsequent legislation or construction by the courts.²⁴ The second category consists of minor variations, frequently of style,²⁵ intended to clarify the sec-

²⁰ In this comment "variation" refers generally to any departure from the 1962 Official Text, whether by way of addition, deletion, or alteration.

²¹ Arkansas, California, Colorado, Connecticut, Maine, Massachusetts, Michigan, Missouri, New Jersey, Nevada, Tennessee, and the Virgin Islands omitted the section. Kansas and Oregon negated the impact of the section through amendment. Kan. Gen. Stat. Ann. § 84-1-109, as noted in U.C.C. § 1-109 (U.L.A. Supp. 1966); Ore. Rev. Stat. § 71.1090 (1963).

²² Seven states, Arkansas, Nebraska, New Mexico, Oklahoma, Oregon, Rhode Island, and Wyoming, adopted the 1958 Official Text and have not yet revised their Codes to conform to the 1962 Official Text. Eleven jurisdictions have enacted the Code with ten or fewer variations. South Dakota (1), Virgin Islands (2), Delaware (3), Vermont (4), North Dakota (5), Texas (5), Illinois (6), Minnesota (6), Pennsylvania (6), Michigan (9), and Alaska (10). California with 113 variations has the most.

²³ See, e.g., Ark. Stat. Ann. § 85-3-501(2)(b) (1961) (enacted identical to § 85-3-501(1)(c)); Conn. Gen. Stat. Ann. § 42a-2-306(2) (1960) ("supply the goods . . . best efforts to" omitted), corrected, Conn. Gen. Stat. Ann. § 42a-2-306(2) (Supp. 1966); Me. Rev. Stat. Ann. tit. 11, §§ 2-402, 7-306 (1964) ("not" omitted), corrected, Me. Rev. Stat. Ann. tit. 11, §§ 2-402, 7-306 (Supp. 1966); Mass. Gen. Laws Ann. ch. 106, § 8-404 (1)(b) (1958) ("has" omitted); N.M. Stat. Ann. §§ 50A-2-708(2), -3-412(2) (1962) ("less" added before "due allowance"; "and" substituted for "or"); N.C. Gen. Stat. § 25-1-201(28) (1965) ("property" added); N.D. Cent. Code § 41-03-34(4)(f) [U.C.C. § 3-304] (1965) (phrase omitted); Wis. Stat. Ann. § 407.404 (1964) ("from whom . . . even though the person" omitted), corrected, Wis. Stat. Ann. § 407.404 (Supp. 1967).

²⁴ See, e.g., Conn. Gen. Stat. Ann. § 42a-2-306(2) (1960) ("supply the goods . . . best efforts to" omitted), corrected, Conn. Gen. Stat. Ann. § 42a-2-306(2) (Supp. 1966); Me. Rev. Stat. Ann. tit. 11, § 7-306 (1964), corrected, Me. Rev. Stat. Ann. tit. 11, § 7-306 (Supp. 1966); N.M. Stat. Ann. § 50A-3-412(2) (1962) ("and" substituted for "or").

²⁵ See, e.g., Cal. Comm. Code § 3112(1)(b) (West 1964); Conn. Gen. Stat. Ann.

tion.²⁶ The third category includes substantive variations that are not out of harmony with the purposes of the official Code provision;²⁷ such changes are usually intended to meet some specific local need.²⁸ The fourth category is made up of the hard core of substantive alterations of the official text.²⁹ This kind of variation occurs when the legislature of a state concludes that the official provision is either inadequate³⁰ or ill conceived.³¹

Typographical errors and other variations of the type first noted pose few insurmountable problems for uniformity. These errors will be corrected in subsequent legislation once they are brought to the attention of the legis-

§ 42a-2-305(4) (1960) ("be" changed to "is"); Ohio Rev. Code Ann. §§ 1301.04 [U.C.C. § 1-104], 1304.01(B) [U.C.C. § 4-104], 1308.07(B)(2) [U.C.C. § 8-202(2)(B)] (Baldwin 1964), as amended, Ohio Rev. Code Ann. § 1304.01(B) [U.C.C. § 4-104] (Baldwin Supp. 1966); Wis. Stat. Ann. §§ 401.201(38), 403.803 (1964).

²⁶ See, e.g., Cal. Comm. Code §§ 4202(3), 4401(1), 4406, 8301(1), 9306(4), 9311 (West 1964) (§ 8301(1) amended to conform to Official Text, Cal. Comm. Code § 8301(1) (West Supp. 1966)); Mass. Gen. Laws Ann. ch. 106, §§ 2-316, 7-210(1) (1958), as amended, Mass. Gen. Laws Ann. ch. 106, § 2-316(5) (Supp. 1965) (making clear that blood and human tissue supplied in connection with medical treatments are not "goods"); N.J. Stat. Ann. § 12A:9-407 (1962) (adding "amendment"); N.Y. U.C.C. §§ 9-105(1)(j), -318 (McKinney 1964); Pa. Stat. Ann. tit. 12A, § 9-403(4) (Supp. 1967) (upon updating from 1952 Code, added sentence emphasizing intent to adopt new rule in 1962 Code); W. Va. Code Ann. § 46-5-102 (1966) (substitutes "the effective date of this chapter" for "this Act"); Wis. Stat. Ann. §§ 402.205, 403.803 (1964) (adds "unless consideration is given," adds "to him").

²⁷ See, e.g., Ala. Code tit. 7A, § 9-302(5) (1966) (excludes property of certain public utilities); Cal. Comm. Code §§ 3506(2), 4405, 7209, 9105(1)(j) (West 1964), as amended, Cal. Comm. Code § 7209(3)(b) (West Supp. 1966) (source of 1966 officially recommended amendment); Conn. Gen. Stat. Ann. §§ 42a-6-106(3) [U.C.C. § 6-107(3)], -107(3) [U.C.C. § 6-108(3)] (Supp. 1966); Ind. Ann. Stat. § 19-9-307(2) (1964); Mass. Gen. Laws Ann. ch. 106, §§ 2-312, 5-113(2), 9-307(2) (1958), as amended, Mass. Gen. Laws Ann. ch. 106, § 2-312(4) (Supp. 1965); N.Y. U.C.C. §§ 9-105, -106, -504, -505 (McKinney 1964), as amended, N.Y. U.C.C. §§ 9-105, -106 (McKinney Supp. 1966) (source of 1966 officially recommended optional amendment); R.I. Gen. Laws Ann. § 6A-2-315 (Supp. 1966); Vt. Stat. Ann. tit. 9A, §§ 2-719(3), 9-302 (1966), as amended, Vt. Stat. Ann. tit. 9A, § 9-302(4) (Supp. 1966); Va. Code Ann. § 8.2-318 (1965); Wis. Stat. Ann. §§ 402.312, 407.204 (1964).

²⁸ See, e.g., Alaska Stat. § 45.05.560(b)(6) [U.C.C. § 7-210(2)(f)] (1962); Ala. Code tit. 7A, § 3-103(1) (1966); Cal. Comm. Code §§ 7202(2), 8317(1) (West 1964); Conn. Gen. Stat. Ann. § 42a-2-402(3) (Supp. 1966); Ga. Code Ann. §§ 109A-8-106, -9-104(j), -204(4)(a) (Supp. 1966); Ind. Ann. Stat. § 19-2-102 (1964); Me. Rev. Stat. Ann. tit. 11, § 9-403(4) (1964).

²⁹ See, e.g., Cal. Comm. Code §§ 2201(3)(b), 3107(2), 7104(3), 8106, 8402(4), 9505 (West 1964); Colo. Rev. Stat. Ann. § 155-2-725(1) (1965); D.C. Code Ann. § 28:4-403 (Supp. V, 1966); Ga. Code Ann. § 109A-9-401(1)(b) (Supp. 1966); Mass. Gen. Laws Ann. ch. 106, § 5-107(2) (1958); Neb. Rev. Stat. U.C.C. § 1-201(26) (1964); N.J. Stat. Ann. § 12A:9-403(1) (Supp. 1966); N.Y. U.C.C. §§ 3-304(7), -415(6), 5-102, 8-107(2), -304(3), -313(3), 9-103(6) (McKinney 1964); N.C. Gen. Stat. § 25-2-310 (1965); S.C. Code Ann. § 10.2-606, as noted in U.C.C. § 2-606 (U.L.A. Supp. 1966); Wis. Stat. Ann. §§ 402.207(2), 403.118 (1964). The omission of U.C.C. § 2-316 by Mississippi is also an example of this kind of variation.

³⁰ See, e.g., Cal. Comm. Code §§ 2403(3), 3804 (West 1964); Mo. Ann. Stat. § 400.3-307(3) (Supp. 1966); Ore. Rev. Stat. § 76.1020 (1965).

³¹ See, e.g., Cal. Comm. Code §§ 1201(31), 2201(3)(b), 2302, 9313 (West 1964); Mass. Gen. Laws Ann. ch. 106, § 5-107(2) (1958); N.Y. U.C.C. § 5-102 (McKinney 1964); Wis. Stat. Ann. § 402.616(3) (1964).

lature.³² Until the legislature corrects such errors, the courts will be able to correct the applicable section by construing it as though it had been correctly enacted. This is easily done if the effect of the error is to render the section meaningless.³³ In some cases, the section has its meaning changed by a typographical error.³⁴ Here it is necessary for the courts to resort to the legislative history of the affected section to determine if an intent existed to so change the section. If no evidence of such an intent exists, it again should be possible to remedy the error through construction.³⁵

Variations of style, intended to clarify the meaning of a section, should not pose problems for uniformity, since the meaning and effect of the section is not altered.³⁶ Unilateral alterations, even of this type, however, sometimes pose problems for the courts and will be considered later.³⁷

Different problems are presented by alterations which do not conflict with the basic purposes and policies of the official Code text, *i.e.*, when the enacting state has changed its Code to meet some locally felt need. The legislatures may have acted with a feeling that uniformity would not be importantly affected because the changes proposed had particular applicability only in their own states. The ramifications of such changes, however, are not always explored to test out these feelings. In some cases Code provisions are deleted because they are considered superfluous under local law,³⁸ but this practice overlooks the fact that the local Commercial Code may govern transactions that occur in other states.³⁹ In a different situation, references are added. For example, California added "honey" to its definition of "farm products" under section 9-109,⁴⁰ and Maine, Massachusetts, New Jersey, and Rhode Island added "oysters on leased, licensed or owned beds" to the definition of "crops" in the same section.⁴¹ The Permanent Editorial Board

³² See, e.g., Comm. on Commercial, Banking & Business Law of N.C. Bar Ass'n, Recommendations to the 1967 General Assembly: Essential Amendments to N.C. G.S. Chapter 25, the Uniform Commercial Code of North Carolina. The reports of the Permanent Editorial Board may also serve to bring the attention of state legislatures to these kinds of errors.

³³ See, e.g., Ark. Stat. Ann. §§ 85-3-206, -9-502(2) (1961); Conn. Gen. Stat. Ann. § 42a-5-107(3) (1960).

³⁴ See, e.g., Conn. Gen. Stat. Ann. § 42a-2-306(2) (1960), corrected, Conn. Gen. Stat. Ann. § 42a-2-306(2) (Supp. 1966); N.M. Stat. Ann. § 50A-3-412(2) (1962).

³⁵ Cf. *Mankato Citizens Tel. Co. v. Commissioner of Taxation*, 145 N.W.2d 313 (Minn. 1965). See generally 2 Sutherland, *Statutory Constructions* §§ 4924-27 (3d ed. 1943, Supp. 1966).

³⁶ Variations intended to clarify may, however, change the meaning of the section if care is not taken. See Wis. Stat. Ann. § 402.207(2) (1964).

³⁷ See note 80 *infra*.

³⁸ See, e.g., Cal. Comm. Code §§ 2326(3)(a), 8105(1), 9104(b), 9206(1) (West 1964), as amended, Cal. Comm. Code § 2326(3) (West Supp. 1966); Ga. Code Ann. § 109A-9-104(b) (Supp. 1966); Ohio Rev. Code Ann. § 1309.04(B) [U.C.C. § 9-104(b)] (Baldwin 1964); Okla. Stat. Ann. tit. 12A, § 4-102(2) (1963).

³⁹ See U.C.C. § 1-105(1).

⁴⁰ Cal. Comm. Code § 9109(3) (West 1964).

⁴¹ Me. Rev. Stat. Ann. tit. 11, § 9-109(3) (1964); Mass. Gen. Laws Ann. ch. 106, § 9-109(3) (1958); N.J. Stat. Ann. § 12A:9-109(3) (Supp. 1966); R.I. Gen. Laws Ann. § 6A-9-109(3) (1961).

did not recommend these particular variations to the states for adoption.⁴² It is submitted that a better policy would permit such changes to be made everywhere, since they do not disrupt any settled nationwide policies, and the changes do accord with the feelings in those jurisdictions in which the goods are of commercial importance. As matters stand, identical goods may be differently categorized in different states. It is to be noted that categorization is a fundamental step in determining the force with which other provisions of Article 9 apply.⁴³ It is unrealistic to expect a state with a positive special interest to conform its Code to the official text like other states. The proposed policy is consistent with the policy of the Board to reject amendments deleting references from the official text in states where the references are superfluous.⁴⁴

The deleterious results for uniformity occasioned by variations of the fourth type are obvious, and important steps have been taken to correct the existing situation to the extent possible. The Permanent Editorial Board examines proposed amendments to the Code as well as nonuniform variations which may be adopted by individual states, and the Board either approves the proposed changes for adoption by all the states or disapproves the proposals. This procedure was instituted with the hope that the individual states would be less inclined to unilaterally alter their Codes if they were given the opportunity, through the Board, to see the change made in all states at the same time. It was also hoped that the states would be less willing to enact a variant if their proposals met with a rejection by the Board and an argument which refuted the desirability of the alteration.⁴⁵

In October 1964, the Board examined all new unofficial amendments made in the Code jurisdictions since the first report of the Board in 1962. The Board found that

none of the unofficial variations is such an improvement over the 1962 Official Text of the Code as to lead the Board to recommend it at this time. Therefore, for the 1965 session of legislatures the 1962 Text of the Code will continue to be the Official Text.⁴⁶

In 1965 the Code was adopted in fourteen more states,⁴⁷ and in 1966 five more states enacted it.⁴⁸ Substantive variations were encountered in most of these states,⁴⁹ diminishing the hope for an early success by the Board in its quest for uniformity of text under the Code.

⁴² 2 Permanent Editorial Board for the Uniform Commercial Code Rep. 181-82 (1964) [hereinafter cited as P.E.B. Rep.].

⁴³ See U.C.C. § 9-105, Comment 5.

⁴⁴ See 2 P.E.B. Rep. 41, 72-73, 172 (1964).

⁴⁵ *Id.* at 12.

⁴⁶ *Ibid.*

⁴⁷ Alabama, Colorado, Florida, Hawaii, Iowa, Kansas, Minnesota, Nevada, North Carolina, North Dakota, Texas, Utah, Washington, and the Virgin Islands. Willier & Hart, *op. cit. supra* note 9, at 3-1.

⁴⁸ Delaware, Mississippi, South Carolina, South Dakota, Vermont. *Ibid.*

⁴⁹ The states which adopted the Code in 1965 have varied the Code [Virgin Islands (2), North Dakota (5), Texas (5), Minnesota (6), Hawaii (11), Kansas (12), Florida (13), Utah (13), Alabama (16), Washington (16), Iowa (18), Nevada (20), North

A major factor behind the rash of variations encountered to date is that, in the process of convincing the legislatures in each of the states to adopt the Code, much effort had to be made to demonstrate that the Code improved existing law.⁵⁰ Accordingly, the legislatures came to view the proposed Code in the light of its meliorative effect on the prior state law, and whenever they considered provisions which, in their opinion, did not improve, or more particularly, changed the law for the worse, they were not hesitant to alter their Code. For some, the Code was a model act, not a uniform law.⁵¹

Another factor which in part accounts for the numbers of states which have enacted variants lies in the history of the drafting of the 1962 Official Text. This text differs significantly from the 1952 text largely because of the opposition of the New York Law Revision Commission to that text.⁵² With this example before them, it was unreasonable to expect legislators of a subsequently adopting state not to subject the Code to as painstaking an analysis as time would permit. California, for example, did this, and in many instances departed from the 1962 Official Text.⁵³ This searching type of analysis is, in the long run, beneficial for the ends which the Code serves, for without it there is always the possibility that the better rule would not be adopted.

Now that the initial difficulties of getting the states to adopt the Code have just about ended, it is no longer necessary to "sell" the Code. The Board can emphasize the elimination of variants, and it should be possible, over the next several years, to obtain that identity of text which is the basis for permanence of a uniform law.⁵⁴ Even if all the states cannot be persuaded to accept the same provisions, it should at least be possible to standardize the extant variations and in that way promote the goals which uniformity serves.

III. THE COMMERCIAL CODE IN THE COURTS: UNIFORMITY OF INTERPRETATION

Despite the many variations of official Code provisions which have been noted, the fact remains that most Code sections are identical in most states. As has been frequently noted, however, uniformity of text is futile unless the text receives uniform interpretation and construction by the courts.⁵⁵ Since

Carolina (23), Colorado (30)] somewhat more than the states which adopted it in 1966 [South Dakota (1), Delaware (3), Vermont (4), South Carolina (10), Mississippi (11)].

⁵⁰ See, e.g., Llewellyn, *Why a Commercial Code?* 22 *Tenn. L. Rev.* 779 (1953).

⁵¹ See, e.g., Committee on the Commercial Code of the Cal. State Bar, *The Uniform Commercial Code*, 37 *Cal. S.B.J.* 117, 221 (1962). But see Schnader, *supra* note 7, at 237, 69 *Com. L.J.* at 117. See generally Dunham, *supra* note 16, at 247.

⁵² See 1 *P.E.B. Rep.* 7 (1962). The New York report did not directly affect the drafting of the 1962 text, but did contribute to changes made between 1952 and 1962.

⁵³ See generally Committee on the Commercial Code of the Cal. State Bar, *supra* note 51.

⁵⁴ It may be argued that some form of external coercion is needed if identity of text is ever to be obtained. See discussion pp. 570-72 *supra*.

⁵⁵ Cf. *Neil B. McGinnis Equip. Co. v. Henson*, 406 P.2d 409, 411 (*Ariz. App.* 1965) (*Uniform Conditional Sales Act*). See generally Merrill, *Uniformly Correct Construction of Uniform Laws*, 49 *A.B.A.J.* 545 (1963).

legislation, in this case the text of the Code, can only establish general guidelines and cannot be expected to provide explicitly for every contingency which may require the intervention of the courts, the decisions under the Code will form as much a part of the groundwork on which businessmen base their expectations as does the text itself. Uniformity of decision from jurisdiction to jurisdiction is an even more important means of ensuring certainty, predictability, and efficiency for commercial transactions than uniformity of text.⁵⁶ Inability of the courts to reach uniform constructions is the rock upon which prior attempts at uniform laws have met with substantial failure.⁵⁷

The major section of the Code which addresses itself to guiding the courts in their task of keeping the Code uniform is section 1-102. In pertinent part it provides:

- (1) This Act shall be liberally construed and applied to promote its underlying purposes and policies.
- (2) Underlying purposes and policies of this Act are
 - (a) to simplify, clarify and modernize the law governing commercial transactions;
 - (b) to permit the continued expansion of commercial practices through custom, usage and agreement of the parties;
 - (c) to make uniform the law among the various jurisdictions.

From the structure of the section, it appears that "uniformity" is but one of three coequal basic purposes. The section does not provide any indication of the relative weight to be given to any of these purposes should conflict arise. As a practical matter, such conflict is likely only in the following context: the court is faced with a precedent which, if followed, in the estimation of the court, would disserve either the simplicity, clarity, or modernization of the law, or would hinder the development of practices along the lines set out in subsection (2)(b).

It has been argued that in such cases uniformity is the prime purpose and that the other purposes are but adjuncts to it.⁵⁸ The argument is basically as follows. The individuals who devoted their time and energy to drafting the Code would not have done so had the Code been intended to be no more than a model act. Therefore, the Code must be more than a model act, and it is

⁵⁶ The Code contains sections designed to provide uniformity in interpretation. Section 1-109 makes section captions explicitly part of the Code and makes clear that they should be used as aids in construction. A construction against implicit repeal of other Code sections is called for by § 1-104, and § 1-108 provides for the severability of Code provisions. These last two sections are designed to ensure the relative permanency of Code provisions once such provisions are adopted. Section 1-109 has been varied. See note 21 *supra*. Section 1-104 has not been importantly varied, but § 1-108 was omitted by Arkansas, Connecticut, and Ohio. Variation of these sections is particularly to be deplored since such variation increases the likelihood of nonuniform and divisive constructions.

⁵⁷ See Schnader, *Why the Uniform Commercial Code Should Be "Uniform,"* 20 Wash. & Lee L. Rev. 237, 239 (1963), reprinted at 69 Com. L.J. 117, 118 (1964); Sicherman, *Construction of Clause in Uniform State Laws Providing for Uniformity of Interpretation*, 2 A.B.A.J. 60, 61-62 (1916).

⁵⁸ 1 P.E.B. Rep. 8 (1962); Schnader, *supra* note 57, at 237, 69 Com. L.J. at 117.

the quest for uniformity which makes it so; uniformity must prevail over the other purposes. This argument fails to take into account the fact that in many instances the Code was "sold" as though it were a model act. Indeed, Llewellyn felt that the Code "would be worth adopting without reference to uniformity."⁵⁹ This incongruity can be resolved, it is submitted, by regarding uniformity primarily as a means toward achieving the other enumerated purposes of the Code. In this light, and bearing in mind the difficulties which "correction" of nonuniform constructions will entail, a great deal of emphasis can properly be placed on the maintenance of uniformity without the distortion of perspective which overemphasis on uniformity would cast on the problems that courts will have to face.

Assuming, then, that uniformity is of major importance, it is to be determined whether subsection (2)(c) is adequate as a guide to the courts. If its mandate is not clear, it should be replaced by a more efficient instrument. Every effort must be made to inhibit judicial construction from unmaking the carefully laid foundations of a universal commercial law. The language of section 1-102(2)(c) was adopted by the official text almost without change from the standard uniformity sections of prior Uniform Laws.⁶⁰ Such sections have received consideration by the courts in many states, and it is not unreasonable to expect that courts faced with the application of section 1-102(2)(c) will look for guidance, in part, to the decisions under the prior uniformity sections. The unfortunate fact of the matter, however, is that the prior sections met with widely disparate interpretations and applications by the courts.

Many courts agreed that the sections encouraged them to consider external decisions if presented. It was said that "the opinions of state judges in other commonwealths will be helpful here."⁶¹ This statement, while not particularly enthusiastic, is probably most reflective of how the courts actually read the sections. Some courts took the position that they "should be inclined to give great weight to harmonious decisions of courts of other States."⁶² This position was summarized in a recent case:

While these opinions, by the highest tribunals of a sister state, are not binding upon this court, they are of signal import, and we are more or less imperatively obliged to recognize their value as a guiding precedent. A paramount objective of our uniform state laws is the standardization of particular subjects within the United States and, to that end, we should refer to and seriously consider

⁵⁹ Llewellyn, *supra* note 50, at 785.

⁶⁰ See, e.g., Uniform Sales Act § 74 (1906), which declares that "this act shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it." Only the NIL did not have a comparable section when it was promulgated.

⁶¹ *In re Hedgeside Distillery Corp.*, 123 F. Supp. 933, 953 (N.D. Cal. 1952) (Uniform Warehouse Receipts Act).

⁶² *Union Trust Co. v. McGinty*, 212 Mass. 205, 208, 98 N.E. 679, 681 (1912) (NIL).

the construction given to comparable statutes in other jurisdictions.⁶³

One forceful opinion which took the position that precedents from other states should be followed was handed down in a case decided under the Negotiable Instruments Law:

It is fundamental that the court of no state in which the law is enacted is bound by the construction of the statute by the courts of other states; but courts, with full knowledge of the history of this legislation, . . . should upon all questions of construction, where the rule adopted by other states is not plainly erroneous, be disposed to follow the construction given to the act by the courts of the state in which the act has heretofore been adopted and construed.⁶⁴

The strongest acceptance of a binding effect by the standard provision is contained in the line of cases of which the following is an example:

Under the last provision [the uniform construction clause] decisions of the highest courts of other states are, speaking generally, precedents by which we are more or less imperatively bound in cases where similar questions are presented.⁶⁵

Unfortunately, the most forceful evaluations of the uniformity section were given by courts which did not follow decisions from other states, but ignored the provision and conceded no effect to it.⁶⁶ Too often, perhaps, this was the fault of counsel, who, for one reason or another, did not alert the courts to the relevance of decisions from other jurisdictions. At the very least, these courts did not feel obliged to seek out the decisions for themselves.⁶⁷ The prior uniformity section, in some cases, may have contributed to a uniform construction. But as some of the cases under the Negotiable Instruments Law—which did not have a comparable section—reveal, the section was not of imperative assistance to those courts which were themselves prepared to foster uniformity.

This much is clear: the old section did not convey even a modicum of standard meaning to the courts. It was not consistently held to impose any obligations on the courts. Thus, to renew the language of the section in

⁶³ *State v. Weissman*, 73 N.J. Super. 274, 281, 179 A.2d 748, 752 (App. Div. 1962) (Uniform Narcotic Drug Act).

⁶⁴ *Kansas Bankers Sur. Co. v. Ford County State Bank*, 184 Kan. 529, 531-32, 338 P.2d 309, 312 (1959).

⁶⁵ *Town of Manchester v. Town of Townshend*, 109 Vt. 65, 69, 192 Atl. 22, 23 (1937) (Uniform Declaratory Judgment Act).

⁶⁶ For an example of judicial nonconsideration of appropriate precedents under a uniform law, compare *New Jersey Title Guarantee & Trust Co. v. Rector*, 76 N.J. Eq. 587, 590, 75 Atl. 931, 932 (1910), and *Arbuthnot, Latham & Co. v. Richheimer & Co.*, 139 La. 797, 805-07, 72 So. 251, 254 (1916), with *Graves v. Garvin*, 272 F.2d 924, 929-30 (4th Cir. 1959) (Uniform Warehouse Receipts Act).

⁶⁷ See *Merrill*, *supra* note 55, at 547.

the Code was to invite a continuation of the dissimilar practices which had grown up with the old section. Section 1-102 does nothing but confuse the situation for the courts. It uses language which has already been construed in several ways without indicating which, if any, of these constructions it adopts. By adding other basic purposes without assigning any relative weight to them, it adds still further ingredients of confusion. If this section, the foundation in the Code for ensuring uniform action by the courts, is not improved, it is unlikely that the courts, on their own, will afford the Code that degree of uniformity in interpretation which is necessary for uniformity in permanence. What is required is some new legislation; either an amendment to the Code, or a Uniform Construction of Uniform Acts Act should be presented and adopted. This legislation should spell out, to the limits of the authority of the legislatures over the courts, how the courts should treat uniform laws. Before such legislation is propounded, however, the factors which impel courts to their determinations should be appreciated, and the contexts in which courts are faced with problems of uniformity should be reexamined.

As has already been noted, courts are most frequently faced with problems requiring a consideration of uniformity in cases in which a relevant precedent from another Code jurisdiction is to be weighed.⁶⁸ In addition to section 1-102, other factors will affect the court's determination. General rules of statutory construction⁶⁹ may apply. Of particular relevance will be those rules relating to the construction of statutes adopted from other jurisdictions,⁷⁰ and to the liberal construction of statutes.⁷¹ But the guiding principle for the court will be the rule that the intention of the legislature must govern whenever that intention can be ascertained.⁷² In reaching its decision, the court may also have the advice of legal scholars and other interested groups.

The Permanent Editorial Board has decided, in response to suggestions,⁷³ to make amicus briefs by Board members available to appellate courts about to consider novel questions of construction under the Code. These briefs will reveal the Board's position on the construction of the pertinent sections.

⁶⁸ Even if there are no precedents to be weighed, the fact that a court is construing a Uniform Act adds a dimension to its inquiry; it must be careful to construe the act so as to permit a uniform application of the law in other jurisdictions. "A construction must be adopted which permits uniform operation of the statute." *Conville v. Bakke*, 400 P.2d 179, 193 (Okla. 1964).

⁶⁹ For an illuminating comparison of canons of construction used by courts, see Llewellyn, *The Common Law Tradition* 521-35 (1960).

⁷⁰ See, e.g., *Shultz v. Young*, 205 Ark. 534, 538, 169 S.W.2d 648, 651 (1943) (Uniform Contribution Among Tortfeasors Act); *Skowron v. Skowron*, 259 Wis. 17, 19, 47 N.W.2d 326, 327 (1951) (Uniform Declaratory Judgment Act).

⁷¹ The statutory direction to liberally construe statutes developed to counter the practice of courts to strictly construe statutes in derogation of the common law. See generally *Sicherman*, *supra* note 57, at 65. Under a liberal construction clause, which the Code has, the courts should seek to promote and to perpetuate the intention of the legislature in adopting the statute.

⁷² For an incisive analysis of this subject, see MacCallum, *Legislative Intent*, 75 Yale L.J. 754 (1966).

⁷³ See *Merrill*, *supra* note 55, at 547.

It is hoped that this practice will lead to a "correct" construction the first time any court decides a question, and thereby obviate the difficulties that inevitably arise if the first decision by a court is one which most courts would reject. The weight to be given to an amicus brief by the courts depends in large measure upon the relationship between the Board on the one hand, and the legislatures of the individual states on the other hand. Courts have recognized that the deliberations of the draftsmen are, in the case of Uniform Laws, a valid source for discovering legislative intent, at least where no extensive legislative history at the state level exists.⁷⁴ In one case it was said:

In construing a uniform law, the meaning of which is not clear, the intention of those who drafted it, if that intention may be ascertained, should be given controlling consideration, else the desired uniformity will not result. Futile, indeed, is the passage of uniform laws by the several states if the courts are to construe them differently.⁷⁵

Amicus briefs by the Board are not the same, of course, as papers, comments, and other indicia of intent made during the process of drafting the Code. The opinions embodied in the briefs are, at least potentially, after-the-fact appreciations of problems which were only dimly perceived when the Code was drafted. Otherwise the situation could have been considered in the official comments.⁷⁶ In this sense, the opinions of the Board are analogous to the opinions of a later legislature and are no sure guide to determining the legislative intent. It is submitted, however, that the real value of the amicus briefs, and of the Comments of the Commissioners, lies not in any relationship to the intent of the legislature, but rather in their reflection of the attitude of the rest of the nation—the other states which have adopted the Code—on important questions that arise under the Code. These briefs should be considered as the best indication of the construction most likely to induce harmonious decisions from other states.

The practice of submitting amicus briefs has only recently been embraced by the Board, and it is too early to tell what kind of success this practice will bring.⁷⁷ In one recent case,⁷⁸ the court requested an amicus brief

⁷⁴ E.g., *School Dist. No. 46 v. Del Bianco*, 68 Ill. App. 2d 145, 153-54, 215 N.E.2d 25, 29 (1966) (Uniform Arbitration Act); *Layne-Minnesota Co. v. Regents of the University*, 266 Minn. 284, 290-91 n.13, 123 N.W.2d 371, 376 n.13 (1963) (Uniform Arbitration Act). See *Arizona State Bd. of Medical Examiners v. Clark*, 97 Ariz. 205, 210, 398 P.2d 908, 912 (1965) (Model State Administrative Procedure Act).

⁷⁵ *Neil B. McGinnis Equip. Co. v. Henson*, *supra* note 55, at 411.

⁷⁶ The Comment to the U.C.C. title states:

To aid in uniform construction these Comments set forth the purpose of various provisions of this Act to promote uniformity, to aid in viewing the Act as an integrated whole, and to safeguard against misconstruction.

⁷⁷ Such briefs have not been requested in very many instances. Letter from William A. Schnader, Feb. 25, 1967. See Dezendorf, *How the Code's Permanent Editorial Board Is Functioning*, 22 Bus. Law. 227, 228 (1966).

⁷⁸ *Norton v. National Bank of Commerce*, 240 Ark. 143, 398 S.W.2d 538 (1966), 8 B.C. Ind. & Com. L. Rev. 267 (1967).

from the State Commissioner for Uniform State Laws. The Commissioner was aided in preparing his brief by the Board, and this fact was made known to the court. Although this particular request was not the formal equivalent of a request to the Board itself, the failure of the court to adopt the reasoning of the brief indicates that the Board may not always succeed in convincing courts that its interpretation of Code provisions is correct. This raises implications of policy for the Board. What should its position be with respect to a point of construction if the first court to consider the point has not accepted the advice of the Board? Should the Board continue to urge on other states the position it first took? Or should it now relent, and support the position taken by the dissident court? This problem, in its broad outlines, is the same as the problem which every court faces when a precedent with which it disagrees appears to govern. If the decision of the first court is arguably correct, if reasonable minds could disagree as to the meaning of the Code section, then it is more important that the issue be considered decided, since to perpetuate the dispute might undermine uniformity. If in the opinion of the Board, however, the court was plainly wrong, and if the decision of the court was discordant with the basic purposes of the Code sections involved, then corrective steps should be taken. It is submitted that the wiser course would be to urge the legislatures to clarify the import of the section, and to urge the courts to accept the precedent until the legislatures act. This would permit the law on any given point to remain as predictable as possible. The fewer bodies that attempt to change the law, the greater the likelihood that a minimum of different rules will exist at the same time. Thus, precedents decided in harmony with an amicus brief from the Board should be given at least the same weight as would the brief itself. Other factors which add weight to a precedent would be cumulative.

In addition to the amicus brief, the following factors may warrant the attention of a court weighing a precedent. The legislature of the state in which the court⁷⁹ sits may have indulged in extensive variation of official Code provisions. So may the state from which the precedent is drawn. The particular sections being considered may have undergone variation in either state.⁸⁰ The precedent may have been handed down in the other Code juris-

⁷⁹ Federal courts in diversity cases may decide questions under the Code. The rule in *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), would require them to follow state law.

⁸⁰ If extensive variations exist from state to state, two basic situations can be distinguished, each of which presents different problems for courts about to weigh precedents from other states. These problems are in addition to the ones considered in the text.

In the first situation, the section to be construed is, in the state furnishing the precedent, a variant of the official text, which is in force in the jurisdiction where the court sits. If the variation was due to error, and if the court "corrected" the error, the variation should be overlooked. This should also be the result if the variation were merely one of style and did not alter the substance of the section. If, however, the legislature "clarified" the section through amendment, and if this "clarification" does not recommend itself as a necessary operation of the section, the court should be free to disregard the precedent to the extent that it was controlled by the changed sense of the varied section. If the variation was in response to some locally felt need, and if the precedent was controlled by the altered substance of the section, the precedent should be given no more weight

diction prior to the adoption of the Code by the forum state. In the latter situation, the rules relating to the construction of statutes adopted from other jurisdictions are particularly relevant. Even without a provision like section 1-102, constructions by the highest courts of other states would be considered to have been adopted along with the text of the Code and would constitute authoritative glosses on given sections.⁸¹ It is submitted that the application of this rule to the Code is undesirable. The Code was promulgated with the end in mind that it would be adopted by all states. The construction to be given a particular section could not have been intended to depend upon the vagaries of the order in which states enact the Code and in which specific issues reach the highest courts. Nevertheless, in the absence of legislation to the contrary, this rule will continue to be applied by many states. When it is applied, it has the virtue of fostering uniformity.

Although it is hoped that the situation will become less prevalent, an extensive pattern of variations may exist, raising the implication that the Code was not adopted by the state out of considerations of uniformity. It might be argued that less weight should be given to precedents from such a state because the decisions there may not have been handed down with a view to promoting uniformity. On the other hand, if the forum state has the pattern of extensive variation, its courts might feel that they were less required to promote uniformity, and should instead be guided primarily by a desire to improve the law. Any tendency to adopt the above arguments should be attacked when first it appears. Whatever the pattern of variation by a state that has adopted the Code, it should be presumed that eventually the differences between the official text and the Code as adopted will be worked out. It would be folly to aggravate differences, and such arguments can only serve to increase discrepancies.

One more factor, and a most critical one for courts deciding whether to

than logic and the use of analogy will permit. If the precedent was based on a completely varied section, embodying a different policy, there is no reason to pay any attention to it.

In the second situation, the variations are adopted by the legislature of the state whose courts must weigh the precedent. Variations which are the result of error should be "corrected" through construction, and the decisions in other states may be useful for this purpose. If the legislature has "clarified" the section, care must be exercised to determine whether the "clarified" meaning is consistent with the meaning given the section in the precedent. If the two meanings are the same, the variation should be of no effect. If the legislature has departed from the purpose behind the official text, decisions from other states can have little force. See, e.g., *Randall v. Pingree*, 100 N.H. 322, 324, 125 A.2d 638, 661 (1956) (Uniform Conditional Sales Act). But if the legislature has altered the section to accommodate a local interest, and if it has not altered the basic purpose of the section, a decision from another state which illuminates the purpose of the official text should be followed, unless the result would conflict with the local need which prompted the variation.

It is also possible that the sections in both the state handing down the precedent and in the state which must weigh it are variations. In these instances, the basic question is whether the two sections are similar or identical. If so, the fact that the sections are both variants should be of no consequence.

⁸¹ E.g., *Shultz v. Young*, *supra* note 70, at 538, 169 S.W.2d at 651.

follow a precedent, is the quality of the decision. Does it square with the court's sense of "justice"? Does it advance the state of the law? Does the decision foster the other basic purposes embodied in section 1-102? The way a court answers these questions must inevitably influence its decision. It is submitted that unless the precedent is plainly erroneous, the goals served by the Code will most frequently be best served by following the precedent.

The decisions of lower courts in other Code jurisdictions cannot be given the same weight as decisions of final courts of appeal,⁸² since there is always the possibility that such opinions will be reversed either on direct appeal or in some subsequent litigation. If, however, the reasoning of such decisions is compelling, and if the court has reached an adequate result, such decisions should be carefully considered. Once they are followed by high courts in other states, such decisions are not likely to suffer reversals in their own states.

Slightly different problems are faced by lower courts when the highest court of the state has not decided an issue. For these courts, if uniformity is to be promoted, it is submitted that decisions of high courts in other states be given the same consideration as would a decision on the same point by the highest court of the forum state.

With the foregoing considerations in mind, the following section is submitted as a replacement for section 1-102:

Section 1-102—Purposes; Rules of Construction; Variation by Agreement.

(1) This Act is to be construed in such a way as to promote the basic purposes and policies set out in subsection (3) below. As a general rule it is to be held that a uniform rule throughout the jurisdictions which enact this Code best serves the attainment of those basic purposes and policies.

(2) As an aid to the courts of this state in interpreting and applying the provisions of this Act the following mandatory directions are established.

(a) The Comments of the Commissioners on Uniform State Laws, and any other indicia of the purposes of the draftsmen of the Uniform Commercial Code, are evidence of the intent with which this Act was passed.

(b) The decisions of the highest courts of other Code states, and the decisions of the United States Courts of Appeals for those federal jurisdictions which enact this Code, shall be resorted to by the courts of this state in all cases arising under this Act without regard to the absence of reference by counsel.

(i) The decisions of the highest courts of other states (or of the Courts of Appeals or of the Supreme Court) shall have the same force with [lower courts] as would decisions of [highest court] in all cases where [highest court] has not resolved the questions raised.

⁸² The United States Court of Appeals for any federal jurisdiction which has the Code, e.g., the District of Columbia, should be considered as a highest court of appeal. Of course, if the Supreme Court decides a question, its opinions should be given the same weight.

- (ii) [Highest court] is directed to follow relevant decisions from other states unless such decisions are clearly erroneous or would lead to a result not permitted under the Constitution or laws of this state.
- (c) [Highest court] is directed to request the assistance of amicus briefs from the Permanent Editorial Board on all occasions where novel and important questions of construction or application are before the court. These briefs shall be considered persuasive of the result likely to be reached by the courts in other states on the questions raised.
- (3) The basic purposes and policies of this Act are
 - (a) to simplify, clarify and modernize the law governing commercial transactions;
 - (b) to permit the continued expansion of commercial practices through custom, usage and agreement of the parties;
 - (c) to promote over-all commercial prosperity.
- (4) [Present 1-102(3)].
- (5) [Present 1-102(4)].
- (6) [Present 1-102(5)].

In drafting this section, care was taken to avoid the two extreme possibilities that such a Code section might require.⁸³ First, the proposition that the legislature should do no more than tell the courts that uniformity is desirable, and then leave the courts alone, was rejected. That proposition would abandon the Code to all the inherent tendencies which exist for disparate interpretations, offering little hope that anything but diverging constructions would follow. On the other hand, an inflexible rule requiring the courts to follow all pertinent precedents was also rejected. The major defect of such a rule, although it seems superficially plausible, is that it would defy the nature of courts to decide cases according to "justice." The practical results of such a conflict demonstrate the inappropriateness of the rule. In most cases, if a court were faced with a precedent that would lead to a result contrary to the court's sense of "justice," the court would be able to distinguish some feature of the case and use the distinction as a basis for reaching the result "justice" requires. This practice would, in time, create a myriad of precedents, each differing slightly according to the facts of each case, and attorneys would find it impossible to predict the law. Such uncertainty would defeat one basic purpose of a uniform law. Therefore, the appropriate rule must lie between the foregoing extremes.⁸⁴

The proposed section does not conflict with the separation of function between legislature and judiciary, because the essence of the judicial func-

⁸³ For a comprehensive analysis of the possible meanings of the standard uniformity provisions, see Sicherman, *supra* note 57, at 66-78. Sicherman distinguishes three possible constructions of the clause: (1) precatory, (2) mandatory, and (3) reasonable.

⁸⁴ The "reasonable" construction presented by Sicherman, *ibid.*, was the starting point for the drafting of this proposed alternative to U.C.C. § 1-102.

tion is preserved in the requirement that the courts themselves establish the parameters of the "clearly erroneous" test. For two reasons, no provision is made for cases in which decisions from other states are based on varied sections.⁸⁵ First, such decisions are not truly precedents. Second, the existence of variants is a condition which should be limited to the present transitional period, and the proposed section is to operate in permanence. No difficulties should be presented by the existence of standardized alternatives, since the decisions from other states either will or will not be based on the identical section before the court. Hopefully, the proposed section clears up some of the uncertainties surrounding uniform laws by indicating that uniformity is only a means to the attainment of the other basic ends. In all cases of conflict, those ends ought to prevail, but uniformity is accorded high value and great weight.

Two other sections presently found in the Code may, arguably, impede the attainment of uniformity, and so they warrant brief consideration. Section 2-302 permits courts to strike down unconscionable contracts or clauses.⁸⁶ It may be argued that the moral sense of communities differs from place to place, and, since courts reflect this moral sense, nonuniformity may result. This is possible, but uniformity will suffer only in a general sense. Courts cannot help but reflect the moral sense of their communities, and it is better to permit the courts to render such results through the permissiveness of a section 2-302, than to invite a distortion of the meanings of other sections, a practice which would have far more deleterious effects on uniformity.

Section 1-103 preserves the supplemental law of the states where it is not displaced by particular provisions of the Code. Such principles are to supplement the Code. To the extent that underlying principles are different in different jurisdictions, section 1-103 stands in the way of uniformity. The section has a pervasive effect on the entire body and operation of the Code. In its essence it is a disruptive presence. As underlying principles differ, difficult problems of assessing the value of a precedent are created whenever courts rely on supplementary principles in applying the Code.⁸⁷ It is submitted that section 1-103 is an unnecessary aid to decision in any case under the Code. All the requisite guidance may be found by looking at the principles enunciated in sections 1-102(2)(a) and (b), and by using other Code sections by analogy.⁸⁸ Of course, the Code does not dispel the prior law in nonrelated areas. As a practical matter, courts will still be guided to some extent by the principles with which they are familiar, the pre-Code principles of their jurisdictions, but such reliance should not be invited by the Code if uniformity of interpretation is to be obtained.

⁸⁵ See note 80 *supra*.

⁸⁶ California and North Carolina did not enact U.C.C. § 2-302 into their Codes.

⁸⁷ In *re Kravitz*, 278 F.2d 820 (3d Cir. 1960), carrying forward the pre-Code law of Pennsylvania, has led to variations of U.C.C. § 2-702 by six states. At first the Board was not convinced that such amendment was required. 2 P.E.B. Rep. 48 (1964). But in 1966 the Board amended the official text to embody the change made by the states. 1966 Amendments 1-2.

⁸⁸ See U.C.C. § 1-102, Comment 1; Note, *The Uniform Commercial Code as a Premise for Judicial Reasoning*, 65 Colum. L. Rev. 880 (1965).

IV. UNIFORMITY OF DEVELOPMENT: CONCLUSIONS

Lasting uniformity for commercial law requires, in addition to a uniform text receiving uniform interpretation by the courts, uniform development of the law in the different jurisdictions. With such development, advances in the law beyond the limitations now in effect on the Code would take place at approximately the same time and along broadly similar lines in all jurisdictions. As presently constituted, the Code encourages the development of commercial practices by the parties.⁸⁹ Section 1-102(3) and (4), permitting the variation by agreement of the parties of most Code provisions, and section 1-105(1), allowing the parties to choose, again within broad limits, the law which is to apply to their transactions, are the major instruments of this permissiveness.⁹⁰ Such a policy carries with it opportunity for practices to develop which may require a more detailed legislative supervision than is possible under the general power given the courts to void unconscionable contracts.⁹¹ In addition, the Code may be applied analogously to areas which it does not expressly cover—for example, equipment leases, consumer credit, or, in general, contracts for the sale of services rather than goods.⁹²

Both as new practices emerge in areas now covered by the Code, and as the Code is applied to areas not within its express coverage, problems not resolved by the Code are going to be decided along different lines in different states.⁹³ To a large extent, this will be a process of testing through practice; a process that was held up as a reason for not imposing rigid uniformity upon the states.⁹⁴ But at some point, sufficient testing will have taken place for one or more basic lines of development to have emerged and for rules to have crystallized on given questions. If one rule suggests itself as clearly preferable from an over-all point of view, the time will have arrived for an amendment incorporating that rule to be made in the Code of all jurisdictions. On the other hand, if no rule is clearly better, one ought to be selected purely in the interests of uniformity. As a last resort, standardized alternatives might be promulgated.⁹⁵

The task of supervising the development of the Code by promulgating amendments to be adopted by the states has been undertaken by the Permanent Editorial Board.⁹⁶ In practice, however, many Official Amendments were first adopted by individual states, and Board approval was only subsequently

⁸⁹ See U.C.C. § 1-102(2)(b).

⁹⁰ These sections will most frequently be used by parties to important commercial transactions. One of the chief benefits of the sections is to permit the parties to make as certain as possible beforehand the outcomes of all contingencies. In this way the two sections serve the basic ends of convenience and efficiency in an alternative way to absolute uniformity.

⁹¹ U.C.C. § 2-302.

⁹² See, e.g., Comment, Contract Formation and the Law of Warranty: A Broader Use of the Code, 8 B.C. Ind. & Com. L. Rev. 81, 86-92 (1966).

⁹³ To the extent that such development is by extrapolation from provisions contained in the Code, and to the extent that courts follow decisions from other states, development need not lead to nonuniformity in the absence of external supervision.

⁹⁴ See p. 571 *supra*.

⁹⁵ See 1966 Amendments 8.

⁹⁶ See 1 P.E.B. Rep. 11-13 (1962).

forthcoming.⁹⁷ Up to now these amendments have come from states about to adopt the Code, and the Board has not been exclusively faced with the kinds of problems likely to arise from future developments. Nevertheless, the response of the Board to the adoption by many states of provisions extending the warranty protection conferred by section 2-318⁹⁸ may be indicative of the standards by which the Board will determine whether to recommend newly developed rules for adoption.

In 1964, the Board rejected all unofficial amendments to section 2-318, noting:

Beyond the limits of the present Section, the subject is still highly controversial and there appears to be no national consensus as to the scope of warranty protection which is proper. Therefore, no amendment to the Official Text should be made in order to permit the decisional development of such a consensus.⁹⁹

⁹⁷ The table set out below indicates the sections amended and the source of all amendments recommended by the Permanent Editorial Board since it assumed its present function. It is to be noted that no amendments were promulgated in 2 P.E.B. Rep. (1964).

1 P.E.B. Rep. (1962)

Section	Source	Section	Source
1-201 (27)	PEB	7-201	PEB
3-105	N.Y.	8-102	N.Y.
3-112	Mass.	8-107	PEB
3-122	Conn.	8-208	PEB
3-412	PEB	8-306	PEB
3-504	PEB	8-308	PEB
4-106	N.Y.	8-313	PEB
4-109	PEB	8-320	N.Y.
4-204	Fed. Res. Banks	9-103	N.Y.
6-103	Ga.	9-206	PEB
6-104	N.Y.	9-401	PEB
6-106 (4)	Pa.	9-403	Mass.
6-107	PEB	10-104	PEB
6-108	PEB		

1966 Amendments

Section	Source
1-209	N.Y.
2-318	Colo., Del., S.C., Vt., Wyo. (Compare Ala., Ark., Tex., & Va.) (Cal. & Utah omitted it.)
2-702	Cal., Ill., Me., N.J., N.M., N.Y.
3-501	Iowa
7-209	Cal. (Compare Tex.)
9-105	N.Y.
9-106	N.Y.

⁹⁸ Ala. Code tit. 7A, § 2-318 (1966); Colo. Rev. Stat. Ann. § 155-2-318 (1965); Del. Code Ann. tit. 5A, § 2-318, as noted in U.C.C. § 2-318 (U.L.A. Supp. 1966); S.C. Code Ann. § 10.2-318, as noted in U.C.C. § 2-318 (U.L.A. Supp. 1966); S.D. Code, as noted in U.C.C. § 2-318 (U.L.A. Supp. 1966); Tex. U.C.C. § 2-318 (Supp. 1966); Vt. Stat. Ann. tit. 9A, § 2-318 (1966); Va. Code Ann. § 8.2-318 (1965); Wyo. Stat. Ann. § 34-2-318 (Supp. 1965). California and Utah omitted the section to permit decisional law to govern.

⁹⁹ 2 P.E.B. Rep. 39-40 (1964).

In 1966, however, the Board offered as alternative provisions to section 2-318 two new sections, both of which extend warranty protection beyond the limits of the 1962 text. The present section was retained as a third alternative.¹⁰⁰ At this time the Board stated:

There appears to be no national consensus as to the scope of warranty protection which is proper, but the promulgation of alternatives may prevent further proliferation of separate variations in state after state.¹⁰¹

In 1964 all changes in the section were rejected because the subject was "highly controversial" and because the Board wanted to await the "decisional development" of a "national consensus." The Board was also undoubtedly influenced by the fact that the Code was in the process of being considered for adoption by a number of states, and the promulgation of a more extensive warranty section might have jeopardized the chances for adoption of the Code in some of those states. Although at the end of 1966 a consensus still had not emerged, the Code had been adopted in nearly all the states, and the Board no longer felt constrained to await a decisional consensus.¹⁰² This is encouraging, because if the Code is to attain a lasting uniformity it must be able to be adapted to changing conditions and changing needs with relative celerity. As a general rule, avoiding controversy and waiting for a consensus will not serve that end.

The steps taken by the Board have a good deal of merit. Many states had varied section 2-318, and there were even variations in the sections adopted by states which appeared to desire the same rule.¹⁰³ It is probable that the Board, in all candor, could not reach agreement on what the rule ought to be, but it was necessary for the Board to assert the authority of its central position as supervisor of the development of the Code if it was to maintain hope of eventually being able to promote the adoption of a single rule. Thus, the proposal of alternatives served a dual function, reasserting, on the one hand, the authority of the Board, and on the other hand, preventing the further degeneration of uniformity with regard to this particular section. In addition, the fact that the alternatives available encompass most of the range of possible warranty protection means that the pattern of adoption by the states may reveal a greater consensus than would otherwise become apparent. If this should be the case, if most of the states adopt one of the alternatives, the Board will be much better equipped to promote a single uniform rule in the near future.

There are, however, some possible disadvantages in the plan adopted by

¹⁰⁰ 1966 Amendments 8.

¹⁰¹ *Id.* at 9.

¹⁰² In the past, one of the major factors which the Board has been obligated to consider in making proposals was the probable affect of such proposals on future adoption of the Code by new jurisdictions. See 1 P.E.B. Rep. 14 (1962). Now that this hurdle has largely been overcome, it will be increasingly possible for the Board to be guided solely by considerations of making the Code a more effective and lasting instrument.

¹⁰³ Compare Ala. Code tit. 7A, § 2-318 (1966), with Va. Code Ann. § 8.2-318 (1965) and Wyo. Stat. Ann. § 34-2-318 (Supp. 1965).

the Board which warrant consideration. The states may divide fairly evenly in adopting alternatives. This result would make it much more difficult to promote a single uniform rule should this become desirable in the near future. Also, in those states where the legislature adopts the alternative which most restricts the scope of warranty protection, the courts may have difficulty embarking on a course of decisional expansion in the face of the failure of the legislature to so act when given a clear choice. If this occurs, the promulgation of alternatives will have inhibited the decisional development of the consensus which the Board would still like to see.

It is also possible, given the fact that all the states which have varied section 2-318 have done so in favor of a *broader* scope of warranty protection,¹⁰⁴ that the ultimate achievement of a single uniform rule would have been better served by the promulgation, at this time, of an amendment which embodied the most extensive warranty protection. This step, it is submitted, would have at least as good a chance of uncovering a basic existing consensus.

The other major step taken by the Board in 1966 was to establish a committee to reexamine Article 9 in depth.¹⁰⁵ This Article has undergone the most extensive variation of all the articles.¹⁰⁶ The committee, it is hoped, will be able to solve many of the problems which have prevented a more uniform enactment of the Article and clear the way for a new effort to achieve uniformity of text.

In conclusion, it should be repeated that fundamental confusion has been created by regarding uniformity as an end in itself rather than as a means to further the desired ends: certainty, convenience and efficiency for businessmen, and an increase in commercial prosperity. Uniformity should be thought of as an end only if it is recognized, as a general rule, that uniformity is considered to be the best way of achieving those sought-for ends and so becomes coextensive with them. In the long run, it is in the courts, where cases and controversies are decided, that the Code must succeed or fail as the method through which unification of commercial law in this country is to be achieved. It is, therefore, of fundamental importance that the courts be given the most precise directions how to promote those ends.

A watchful eye must also be kept on the development of the law in order to safeguard against the cementing of divergent practices through failure to keep the Code up to date. It should, however, be no cause for despair that every aspect of commercial law cannot be maintained in a uniform status. On some points the law will be constantly in flux in any scheme which regulates so extensive a subject as commercial transactions. Certainly this occurs in the federal regulation of broad subjects.

If the Code succeeds in achieving substantial uniformity—and the indications are that it will succeed to an even greater extent than it already has—a triumph in unification of the law will have been witnessed, a triumph with positive implications for the unification of international commercial law as well.

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¹⁰⁴ See statutes cited note 98 *supra*.

¹⁰⁵ 1966 Amendments v-vi.

¹⁰⁶ See *id.* at vi.